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Supreme Court, U.S.
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No. 97-159

In The

Supreme Court of the United States

October Term, 1996

DEBRA BLACK,

Petitioner,

v.

ZARING HOMES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should This Court Issue A Writ Of Certiorari To Reconsider The Decision Of The Court Of Appeals That The Remarks At Issue In This Particular Case Were Insufficient Under The Well-Settled Principles Of Law Established By This Court To Create A Hostile Work Environment Based On Gender?

2. Should This Court Issue A Writ Of Certiorari To Reconsider A Decision Of A Court Of Appeals Where The Court Of Appeals Properly Met Its Obligation To Decide Issues Of Law And, Applying The Proper Standard Of Review, Reversed A Jury Verdict As A Matter Of Law?

RULE 29.6 LIST

Respondent Zaring Homes, Inc. is a wholly owned subsidiary of Zaring National Corporation, a publicly owned corporation. Zaring National Corporation also has the following wholly owned subsidiaries: HomeMax, Inc. and Zaring Holdings, Inc. In addition to conducting operations directly, Zaring Homes, Inc. also conducts operations through two limited-liability companies: Zaring Homes of Indiana, L.L.C., which has as its two members, Zaring Homes, Inc. and David P. Clark, and Zaring Homes Kentucky, LLC, which has as its two members, Zaring Homes, Inc. and Zaring Holdings, Inc.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Zaring Homes, Inc., respectfully requests that this Court deny Petitioner's request that a writ of certiorari be issued to the unanimous decision of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1997 and reported at 104 F.3d 822 (6th Cir. 1997) (Kennedy, J.). Petitioner's Petition for Rehearing and Rehearing En Banc was denied on April 25, 1997.

STATEMENT OF THE CASE

The unanimous opinion of the Sixth Circuit Court of Appeals at issue here was based on a review of the record facts in the light most favorable to Petitioner Black ("Petitioner" or "Black"). The most significant facts relevant to Petitioner's claim of hostile-environment sexual harassment are set forth in the Court of Appeal's opinion and do not need to be repeated here (Petition, App. 1). However, Petitioner's Statement of the Case incorrectly describes the facts presented in proceedings below. The inaccuracies are material in several instances.

For example, Petitioner leaves the impression that she was the only female attending the bi-weekly land meetings and in her work environment generally (Petition, pp. 3, 27). However, Respondent's Vice-President and General Counsel, Michelle Grigsby (whom Petitioner does not name), is female and attended the land meetings

(Petition, App. 3). There were high-level female executives employed at the Company, including Zaring's Vice-President of Operations and Corporate Vice-President.

Petitioner alleges that she expressed disapproval at two remarks by saying, "Tim, cut it out" and "Not hardly, Ron" (Petition, pp. 3-4). However, there is *no* evidence that anyone heard her.

Petitioner alleges that her supervisor referred to a female as a broad while "looking straight at her" (Petition, p. 4). However, the record is clear that Black's supervisor was talking to Jeff Hafer, a male peer of Black, and that the supervisor used the word "broad" in reference to a county official, not a Zaring employee. There is no evidence that the remark was directed to or related to Black in any way (Petition, App. 5).

Petitioner also continues to assert what the record facts simply will not bear, i.e., that she complained to Michelle Grigsby, Vice-President and General Counsel, about the "gender-based remarks made at the land meetings" and that Grigsby responded that the "male supervisors' attitudes toward women were a fact of life" about which nothing could be done (Petition, p. 5). There is simply no record support for such assertions. The Court of Appeals correctly noted that Black once happened to run into Grigsby in the women's restroom. Black expressed her view that off-task talking at the land meetings "takes up so much time. It doesn't make sense to spend quality business time to get our business done for them to go off on these little tangents and little schoolboy activities laughing and joking" (Petition, App. 5). There is *no* evidence that Black complained about gender-based

remarks or that Grigsby said "male supervisors' attitudes toward women were a fact of life."

ARGUMENT IN SUPPORT OF DENYING THE WRIT

I. Should This Court Issue A Writ Of Certiorari To Reconsider The Decision Of The Court Of Appeals That The Remarks At Issue In This Particular Case Were Insufficient Under The Well-Settled Principles Of Law Established By This Court To Create A Hostile Work Environment Based On Gender?

There is no reason to grant certiorari on this question. The issue presented by *Black v. Zaring Homes* – the point at which sexually-connotative tastelessness becomes actionable harassment – has been answered by this Court already in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). The principles of law applicable to making the necessary distinction are well settled. Petitioner concedes that in *Harris*, the Court "created a fairly workable analytical framework for assessing the viability of a sexual harassment suit" (Petition, p. 27). Petitioner is simply unhappy with the Sixth Circuit's application of that well-established analytical framework to the unique and particular facts of her case. Petitioner's particularized unhappiness is not a proper basis to grant certiorari.

Petitioner realizes this and therefore alleges that there is a split among the circuits "as to whether workplace harassment, especially verbal workplace harassment such as the type addressed in this case, falls above

or below the 'de minimis' line as set forth in *Harris*" (Petition, pp. 9-10). Petitioner argues that the Sixth, Seventh and Tenth Circuits have adopted a "more conservative or restricted view" of what constitutes sexual harassment while the Second, Third, Eighth and Ninth Circuits have adopted a more "liberal and expansive view." Petitioner's argument fails for two reasons. One, such a split does not exist. Two, even if it did, the Supreme Court would not be able to resolve such a split by accepting this particular case for review.

A. There Is No Split Among The Circuits In The Application Of The Well-Settled Principles Of Law Established In *Harris* And *Meritor*.

Every circuit court of appeals recognizes the distinction set forth in *Harris* and *Meritor* between remarks that are "merely offensive" and those that reflect actual gender discrimination and affect the terms and conditions of employment to a sufficiently significant degree to violate Title VII. What causes courts of appeals to reach different results in different cases is not differing philosophies or analytical frameworks, but rather the very different facts unique to the various cases before them.

As this Court has recognized, sexual-harassment cases are highly fact intensive. A "cookie-cutter," "bright-line" definition of sexual harassment is simply not possible. Whether or not Title VII's prohibition against actual gender discrimination in employment has been violated depends on the facts and circumstances unique to each case.

The different results reached in the specific cases cited by Petitioner indicate only that very different facts – analyzed under the uniform criteria set down in *Meritor* and *Harris* – will dictate different results. The Supreme Court could not change that inevitability even if it were to grant review in this particular case.

The cases cited by Petitioner as illustrative of the "liberal" or "expansive" view are *Torres v. Pisano*, ___ F.3d ___, 1997 U.S. App. LEXIS 12805 (2d Cir. 1997), *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994), *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997) and *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994). However, the unique facts of these cases dictated a finding of actionable harassment under the principles established by this Court in *Meritor* and *Harris*, not the supposedly "liberal" stance of the reviewing courts.

In *Torres v. Pisano*, Plaintiff Torres, a Puerto Rican female, claimed not just sex but also race discrimination. She was the only female among the 30 employees who directly reported to her male supervisor, Eugene Coe. Coe constantly harassed Torres on the basis of her sex and race. He habitually referred to her as a "dumb cunt" and "dumb spic." He made insulting remarks about the size of her breasts and buttocks. He made sexual innuendos to Torres. He told other employees, in a crude way, that he wanted to have sex with Torres. He frequently told her to stay home, go on welfare and collect food-stamps like other "spics." When she called in sick, he told others that she was "probably out sucking cocks to earn extra money." He ridiculed her pregnancy by calling her "beer belly" and suggesting that she was too dumb to use birth control. He allowed his friends to say that Torres

gave blow jobs to men who came to the office and even allowed them to throw money at her and order her to strip. This behavior allegedly occurred without cessation over a four-year period.

The Second Circuit rejected the employer's claims that Torres' allegations, as a matter of law, did not suffice to establish the existence of a hostile work environment.[1] The Second Circuit followed *Harris'* teaching that a hostile work environment exists when, because of a plaintiff's gender, the workplace is *permeated* with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment. A hostile work environment is not created by conduct that is "merely offensive." *Torres*, p. 6 citing *Harris*, 510 U.S. at 21. The Second Circuit's recognition of the distinction required by *Harris* and *Meritor* is entirely consistent with the Sixth Circuit's holding in this case. The handful of mildly tasteless remarks complained of in this case are simply not comparable to the targeted and malignant abuse suffered by plaintiff Torres; at worst they were "merely offensive."

Steiner v. Showboat Operating Company, 25 F.3d 1459 (9th Cir. 1994), like *Torres* above, presents facts that are not in the same substantive universe as the facts in the

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[1] This rejection was *dicta* only. The Second Circuit's actual holding was that the employer in *Torres* was entitled to summary judgment in its favor on other grounds, i.e., no liability lies against an employer where an alleged victim of harassment specifically asks the person to whom she reports the harassment to keep the matter confidential and to refrain from taking corrective action. The actual holding of *Torres* is totally inapplicable to that in *Black v. Zaring*.

case at bar. Plaintiff Steiner's supervisor called her offensive names based on gender, such as "dumb fucking broad," "cunt" and "fucking cunt." He expressed disapproval inappropriately, e.g., "You are a fucking casino host. You comp every fucking fleabag that walks through the door" and "Why don't you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?" He repeated the latter query two or three times. The supervisor sought her out to make insulting comments. He also insulted other women in sexually explicit terms, such as referring to their "big boobs." The behavior occurred at least over a two-year period and perhaps longer.

The facts and holding of *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994) are similarly inanalogous. In *Spain v. Gallegos*, the Third Circuit faced an atypical case. The facts of the case presented a strong *quid pro quo* element that is absent from many hostile-environment analyses. Plaintiff Spain alleged that her supervisor conditioned her promotion on her withdrawing a charge of discrimination and on her loaning him money periodically. She withdrew the charge and was promoted, but was forced to loan her supervisor money every month or two over a period of years. Because it was illegal for her government supervisor to accept loans from a subordinate, their meetings to arrange for the loans were always conducted in private. These private meetings led to rumors of an affair between them. Plaintiff Spain's increasing reluctance to lend money and her complaints about the rumors caused her supervisor to escalate his harassment of her, including his visiting her at her house. The rumors and meetings resulted in a tangible detriment to her career,

including the denial of a promotion because her integrity was questioned. The holding of *Spain* is wholly inapplicable to that in *Black v. Zaring*. Black alleged no *quid pro quo* element and no tangible career detriment. No one conditioned Black's career advancement on sexual or financial favors or on enduring rumors of an illicit affair. The two cases are simply inapposite.

In *Smith v. St. Louis University,* 109 F.3d 1261 (8th Cir. 1997), the fourth case cited by Petitioner as reflecting the "liberal" view, plaintiff Smith was an anesthesiology resident who was constantly harassed by the chairman of her department. He referred to her and other female residents by their first name while calling male residents "Doctor." He remarked that she was there because it was "about time he hired some good looking girls." He told her to consider modeling, asked why she polished her nails, and called her and other women "anesthesia babes." He queried why she had not chosen nursing or marriage over the role of doctor, opining that for women, marriage is the preferred route. He predicted that she could not find a husband. He sought out opportunities to ridicule her. His ridicule continued throughout her three-year residency. Male residents were not subjected to his barbs. Again, the facts are very different from the facts in the case at issue here. Petitioner Black was not subjected to a three-year stream of abuse from her direct supervisor. The remarks she complained of did not go to the heart of her workplace role. No one sought out opportunities to humiliate her for no other reason than that she was female.

The Sixth Circuit's decision in *Black v. Zaring Homes, Inc.* presents no conflict with the so-called "liberal" decisions cited by Petitioner. The facts of those cases, because they are so different, provide no rational basis to speculate how the so-called "liberal" reviewing courts would decide a case presenting the facts of *Black v. Zaring*. Black did not suffer a steady stream of sexual ridicule from her direct supervisor (or anyone else) which lasted literally for years. She did not suffer the sexually-explicit language of humiliation – "fucking cunt," "dumb spic," "dumb fucking broad," or the suggestion that women should "suck cocks" or give "blow jobs." She was free from the ridicule based on personal sexual characteristics such as "big boobs." There was no tangible adverse impact on Petitioner Black – no one conditioned a promotion on sexual or other favors and she suffered no career detriment. The harassers in the cases cited by Petitioner went out of their way to ridicule their victims, going so far as to drive to plaintiff's home or coming to work early in order to maximize their opportunity for harassment. None of those elements is present in *Black v. Zaring*.

Accepting Black's allegations as wholly true, the remarks she calls offensive were mild, sporadic, short-term and not prompted by her gender. A one-time use of the vernacular word "broad" for a county official, general snickering at the surname of "Busam" or the neighborhood name suggestion of "Hooterville" for land located next to a Hooter's Restaurant is simply not in the same universe as calling a woman a "fucking cunt" or as conditioning promotions upon loans or enduring rumors that go to one's sexual and professional integrity.

The cases from the Second, Third, Eighth and Ninth Circuits are not in conflict with *Black v. Zaring*.[2] Indeed, the consistency with which the circuit courts of appeals have applied the legal standards set forth in *Meritor* and *Harris* is remarkable.

Struggling for a reason to justify review, Petitioner asserts that the Sixth Circuit held that comments made in the presence of a female employee are less coercive than comments made directly to her (Petition, p. 19). That assertion misrepresents the Sixth Circuit's holding. The court did not create a new standard with respect to

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[2] Petitioner argues that the decisions from the Second, Third, Eighth and Ninth Circuits conflict with decisions from the "conservative" Seventh and Tenth Circuits as well. There is "conflict" only so far as the cases' very different fact patterns require it. In any event, decisions from the Seventh and Tenth Circuits are not at issue here. *Black v. Zaring* is not the proper vehicle to resolve any alleged conflict between *Baskerville v. Culligan Int'l. Co.*, 50 F.3d 428 (7th Cir. 1995) and *Torres*, e.g.

Petitioner also argues for review on the basis of so-called "splits" in appellate court thinking that have no relevance to this case. Petitioner argues that the Tenth Circuit established a two-tiered standard for reviewing claims of sexual harassment, one for blue-collar and one for white-collar working environments. Petitioner also argues that the Tenth Circuit judged on-the-job sexual harassment in the context of off-the-job community standards. Even if that were an accurate characterization of the Tenth Circuit's holding in *Gross v. Burggraft Construction Co.*, 53 F.3d 1531 (10th Cir. 1995), it is irrelevant to this petition. The issues of blue-collar vs. white-collar and on-the-job vs. community standards did not arise and were not addressed in *Zaring*. The Court should not grant a review of the Sixth Circuit's decision in *Black v. Zaring* to correct some perceived imperfections in the analysis by the Tenth Circuit of issues not present in *Black*.

victim-targeted remarks; indeed, it specifically disclaimed doing so. "While we *emphasize* that sex-based comments need *not* be directed at a Plaintiff in order to constitute conduct violating Title VII, we note that in this case most of the comments were not directed at Plaintiff; this fact *contributes* to our conclusion that the conduct here was not severe enough to create an objectively hostile environment" (Petition, App. 10, emphasis added). That most of the remarks at issue in *Black v. Zaring* were part of general repartee and did not target Black was merely one of the many factors that contributed to the Court of Appeal's legal conclusion that the particular remarks at issue in the circumstances of this case were not severe enough to create a hostile environment. Ironically, the court in *Torres, supra,* a decision argued by Petitioner to be in conflict with the decision in *Black v. Zaring,* specifically relied on and cited to the *Black* decision for its observation that sex-based comments need not be directed at plaintiff in order to be actionable. *Torres,* p. 18.

The Supreme Court, in two separate opinions, has set forth clear standards governing when unwelcomed harassment based on gender becomes sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The Court has made clear that the offending conduct must be judged both by an objective and subjective standard, and that all of the facts and circumstances unique to each case must be considered. Whether an environment is "abusive," as opposed to unpleasant or unprofessional, depends on such factors as the frequency of the discriminating conduct, its severity, whether it is physically threatening or

humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. *Harris*, 114 S.Ct. at syllabus (b) and 371, 126 L.Ed. 2d at 302-03. The Sixth Circuit recognized and applied those criteria of legal analysis to the facts of the case before it. That Petitioner is unhappy with the result is not a proper basis to grant certiorari. Petitioner has not identified a principle of law that would be resolved by granting review of this case. Accordingly, Petitioner's request should be denied.

II. Should This Court Issue A Writ Of Certiorari To Reconsider A Decision Of A Court Of Appeals Where The Court Of Appeals Properly Met Its Obligation To Decide Issues Of Law And, Applying The Proper Standard Of Review, Reversed A Jury Verdict?

The answer to this question is clearly no. A review of Petitioner's request in this regard requires the same conclusion. Petitioner concedes that, in reversing the jury verdict below, the Sixth Circuit decided that no "trier of fact could reasonably conclude that the work environment was anything more than merely offensive" (Petition, p. 26). This question of law – whether the conduct alleged in this case met the standards laid down by this Court in *Meritor* and *Harris* – was squarely within the court's decisional authority. The Sixth Circuit met its obligation to decide an issue of law and did so in accordance with well settled principles of law previously established by this Court.

A. Petitioner Has Misstated The Applicable Standard Of Review Below.

Petitioner baldly misstates the standard of review to be applied by the Sixth Circuit in this case. Petitioner states: "It is well-established in federal jurisprudence that a court of appeals may not set aside the verdict of a jury . . . unless it is clearly erroneous or non-plausible" (Petition, p. 22).

The "clearly erroneous" standard applies only when the reviewing court challenges the findings of the trier of fact. That standard of review has no relevance to the issue here. The Sixth Circuit did not challenge the jury's findings of fact, as the reviewing court did in *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 573, 105 S.Ct. 1504 (1985), a case cited by Petitioner. The Sixth Circuit made clear that it did not "weigh the evidence, evaluate the credibility of the witnesses, or substitute [its] judgment for that of the jury" (Petition, App. 7). It took the jury's findings at face value and concluded that Petitioner failed to establish a cause of action against Respondent as a matter of law. Therefore, the "clearly erroneous" standard was not applicable to the court's review.

The Sixth Circuit was asked to review a denial for judgment as a matter of law under Fed. Rule Civ. Pro. 50. The applicable standard of review for questions of law is *de novo. U.S. v. U.S. Gypsum Co.,* 33 U.S. 364, 365, 68 S.Ct. 525 (1948), a second case cited by Petitioner, makes that clear. In *U.S. Gypsum,* the Supreme Court (sitting as a reviewing court), in addition to setting aside the trial court's findings of fact as clearly erroneous, found that

the district court had misapplied the law. The Supreme Court, referring to errors of law below, specifically held. "These [errors of law] we can, of course, correct." *Id.* at 394.

B. There Is No Split Among The Circuits With Respect To Deference To Jury Verdicts In Hostile-Environment Sexual-Harassment Cases.

In addition to misstating the applicable standard of review below, Petitioner attempts to justify review by alleging a second split among the Circuit Courts of Appeals: a split between those courts which show "judicial deference" to jury verdicts and those that take a "more activist role" (Petition, pp. 23-24). Again, however, there is no such split. The results in the decisions cited by Petitioner differ not because particular circuits are prone to judicial "deference" or "activism," but because the facts before them are different. In support of her position, Petitioner has done nothing more than cite to seven different cases with seven different fact patterns with the pronouncement that some presented a jury question while some did not. That is not news and it certainly is not a basis to grant certiorari. Fact patterns inevitably will vary and will require different results under the uniform guiding principles of established precedent.

The cases cited in the Petition as examples of judicial deference do not stand for the untenable proposition, implicitly urged by Petitioner, that hostile-environment cases can never be decided as a matter of law. Rather, as discussed above, in the cases cited by Petitioner where a

jury question was held to exist, it existed only because of the particular facts unique to that case.

The *Torres* court, claimed by Petitioner to be a "deferential" court, recognized that "conduct that is 'merely offensive' and 'not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.' " *Torres* at *11, quoting *Harris,* 510 U.S. at 21. There is nothing in the Second Circuit's recognition of that legal distinction to distinguish its approach from the approach taken by the Sixth Circuit in this case or the Seventh Circuit in *Baskerville, supra.*[3]

The other decisions cited by Petitioner as reflecting a more activist role are not helpful to the analysis of this case. In *Spicer v. Commonwealth of Virginia,* 66 F.3d 705 (4th Cir. 1995) and *Mattern v. Eastman Kodak Co.,* 104 F.3d 702 (5th Cir. 1997) the legal issue was not the existence of an objectively hostile environment. *Spicer* concerned the adequacy of the corrective action taken; *Mattern* was a retaliation case. Those issues are not relevant to the holding of *Black v. Zaring.*

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[3] It should be noted that in *Torres* the Second Circuit affirmed the district court's grant of summary judgment in favor of the employer. The Second Circuit did resolve the issue before it – whether an employer can be held liable where a victim of harassment asks that no action be taken – as a matter of law.

Petitioner's second question for review must be denied for the same reason as the first question. Petitioner has cited no split among the circuits on any important principle of law. The differing results among the courts of appeals are dictated by the different facts of the cases before them and not by a philosophy of "deference" or "restraint." Moreover, even if such a split exists, accepting this case for review would not create an opportunity to resolve it. The facts of cases cited by Petitioner as reflecting a philosophy of deference are so inanalogous to the facts of the case at bar that meaningful comparison is not possible.

CONCLUSION

The Petition contains misstatements of record facts and misstatements of law. The Petition alleges that there is a split of authority among the circuits when, in fact, the circuit courts have been remarkably consistent in applying the standards of *Harris* and *Meritor* to the very different sets of facts before them. Petitioner essentially is asking the Supreme Court to review the Court of Appeals decision in this case because she lost and she wants to

win. That request, while understandable, is an insufficient basis to grant review. Accordingly, Petitioner's request for review should be denied.

Respectfully submitted,

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